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IN THE SUPREME COURT OF THE STATE OF UTAH

NEIL TROTTA,

Plaintiff/Appellant,

vs.

Case No. 18237

THE INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EMPLOY-
MENT SECURITY,

Defendant/Respondent.

DEFENDANT'S BRIEF

**Appeal from a decision of the Board of Review
of the Industrial Commission, State of Utah,
which reversed a decision of the Department of
Employment Security and the Appeal Referee**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No. 18237

THE INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EMPLOY-
MENT SECURITY,

Defendant/Respondent.

DEFENDANT'S BRIEF

NATURE OF THE CASE

This is an appeal pursuant to Section 35-4-10(i), Utah Code Annotated 1953, from a decision by the Board of Review, Industrial Commission of Utah, reversing a decision by an Appeals Referee that allowed unemployment compensation to the Plaintiff/Appellant pursuant to Section 35-4-5(b)(1), Utah Code Annotated 1953, as amended (Pocket Supplement, 1979), on the grounds he had been discharged from his last employment for actions connected with his work which were not disqualifying.

DISPOSITION BELOW

Plaintiff Neil Trotta's October 30, 1981 claim for unemployment benefits was allowed effective November 1, 1981, by a Department Representative who found he was discharged for an act or omission in connection with his employment which was not disqualifying pursuant to Section 35-4-5(b)(1), Utah Code Annotated 1953, as amended (Pocket Supplement, 1979). Timely appeal was made by the employer to the Appeals Referee of the Department of Employment Security on November 17, 1981. On December 10, 1981, a hearing was conducted and subsequently, the Referee affirmed the allowance of benefits by the Department Representative. On December 16, 1981, timely appeal was made by the employer to the Board of Review of the Industrial Commission of Utah, which in turn reversed the decision of the Referee allowing benefits to the Plaintiff in a decision dated February 4, 1982, Case No. 81-A-4474 and 81-BR-431.

RELIEF SOUGHT ON APPEAL

The Plaintiff by this appeal is seeking reversal of the decision of the Board of Review and allowance of benefits commencing November 1, 1981. Defendant seeks affirmance of the decision of the Board of Review which denied benefits to the Plaintiff.

STATEMENT OF FACTS

Defendant substantially agrees with the statement of facts set forth in Plaintiff's Brief.

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDING OF THE BOARD OF REVIEW IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953, provides in part:

In any judicial proceedings under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. Martinez v. Board of Review, 25 U. 2d 131, 477 P. 2d 587 (1970). In analyzing the above-referenced review provision, this Court has stated:

Under Section 35-4-10(i) the role of this Court is to sustain the determination of the Board of Review unless the record clearly and persuasively proves the action of the Board of Review was arbitrary, capricious, and unreasonable. Specifically, as a matter of law, the determination was wrong; because only the opposite conclusion could be drawn from the facts. Continental Oil Company v. Board of Review of the Industrial Commission of Utah, (Utah, 1977) 568 P. 2d 727, 729.

POINT II

THE FINDINGS OF THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Plaintiff contends the facts as found by the Board of Review are not supported by the evidence. This Court has previously held that where the

evidence will sustain different findings, the Court will affirm the findings of the Board of Review. Continental Oil Company v. Board of Review, Supra. There is substantial evidence in the record of this case to sustain the decision of the Board of Review. Defendant acknowledges this is a very close case as reflected by the 2-1 Board decision to reverse the Appeal Referee's allowance of benefits. Nevertheless, the case is close because much of the employer's evidence is hearsay, which, unfortunately is quite often the case in the commission's administrative hearings where the employer has little or no direct pecuniary interest in the outcome; is usually represented by lay persons unfamiliar with rules of evidence who have interviewed the parties having direct knowledge of the matters, but who themselves have no such direct knowledge.

The easy answer in such cases would be to exclude the employer's hearsay evidence. This, however, would be an abdication of Defendant's responsibility to administer the unemployment insurance trust funds to pay benefits to all who are unemployed through no fault of their own, but to deny benefits to those who are responsible for their own unemployment. Olof Nelson Construction Company v. Industrial Commission, 121 U. 525, 243 P. 2d 951; Kennecott Copper Corporation Employees v. Department of Employment Security, 13 U. 2d 262, 372 P. 2d 987.

Furthermore, hearsay evidence is admissible in administrative hearings but must be carefully evaluated to determine its probative value. Board of Review v. Theresa J. Cija, Pennsylvania Supreme Court, 1981, CCH Unemployment Insurance Reports, Pa. ¶10,723.

In analyzing the evidence given regarding Plaintiff's absences on October 19, 20, 27 and 28, 1981, it is noted that the only questions that are not conclusively answered are: 1) whether Plaintiff went deer hunting on more than one of the four days he was absent from work; 2) whether Plaintiff or his wife actually called the employer to report he would not be in; and 3) if they did call in, whether they merely said he wouldn't be in or whether they reported he was ill.

There is no question that:

1. Plaintiff went deer hunting on at least one regular work day; (R.0026-0028).
2. Plaintiff failed to request any of the days off from his employer in that according to his own testimony he or his wife merely called the shop and told whomever answered (they couldn't identify with whom they spoke) that Plaintiff would not be in. (R.0025, 0030-0031)
3. Plaintiff made no effort to inform the employer of the reason he wouldn't be to work. (R.0023-0025, 0027, 0030-0031)
4. Plaintiff knew he was needed at work. (R.0029, 0031)
5. The employer has substantial reason to believe Plaintiff was absent because he was deer hunting on at least one day when he should have been to work or at least have requested the day off. (R.0023, 0032)

6. The employer terminated Plaintiff not only because he believed Plaintiff was deliberately avoiding his responsibilities to the employer to either be to work or request the days off, but because he felt Defendant was not being trustworthy regarding his absences. (R.0023-25, 0031, 0032)

Under Part A of Point I of his Brief, Plaintiff argues that going deer hunting while sick with the flu is not misconduct. Such a generalized statement is incorrect on its face; however, neither the employer's decision to discharge the Plaintiff, nor the Board's denial of benefits were based on this premise. As stated below, the reason claimant was terminated by the employer and denied unemployment benefits by the Board of Review is that he failed to notify the employer of the reasons for his absence and attempted to conceal those reasons from his employer. He thus lost his credibility with his employer (R.0032) and failed to establish credibility with the Board of Review (R.0007 and 0008) or even the Appeal Referee, who had allowed benefits (R.0018).

Under Part B of Point I of his Brief, Plaintiff argues he did not break any company policies regarding absences from work. Plaintiff cites as support for this argument a sentence from the testimony of the employer's representative, Mrs. Fisher, at R.0023, that any employee could have time off for any reason even if it was inconvenient for the employer. Plaintiff failed to take notice, however, of Mrs. Fisher's next sentence which gives the employer's policy regarding absenteeism. Both sentences are as follows:

I'd like to also state with this information that we like to feel that we are reasonable with our employees and

anyone who comes to us asking for additional time off, for almost any reason, generally gets it even if it's inconvenient to us. But we feel that our employees need to be honest with us and considerate of our needs as employers also, and people who don't tell us what they really need, we don't feel like we can trust them. (R.0023) (Emphasis added.)

Mrs. Fisher explained the application of this policy to Plaintiff at R.0032:

But when the deer hunting problem came up and he couldn't even call us up to say, "Look, I want to go deer hunting another day. I won't be in," we felt like at that point he didn't trust us enough and we couldn't trust him enough to keep him around. The date of deer hunting, even if it was, as he said, the 27th, it would be the same position. The 27th was a day he should have been at work. (R.0032)

Thus it is clear that Plaintiff was not fired for going deer hunting while ill, or not failing to work overtime, or for poor job performance, or for failing to notify his employer of his absences, although these factors may have been part of the overall consideration. Therefore, Plaintiff's argument under Parts A, C, D and E beg the question in that they are not responsive to the primary reason given by the employer for terminating Plaintiff (R.0023, 0032) nor to the reasoning of Defendant in denying Plaintiff unemployment insurance benefits. (R.0007)

Under Part E of Point I of his Brief, Plaintiff argues that Plaintiff or his wife called the employer each day Plaintiff was absent. However, even Plaintiff noted that the requirement was not just that the employee call in, but that he was to "advise them of the reason for the absence (R.24)" (Page 13 of Plaintiff's Brief.)

Even if Plaintiff or his wife did call the employer each day Plaintiff was absent, it is clear that neither advised the employer of the reason for the absence. (R.0023-0025, 0027, 0030-0031)

Plaintiff was also evasive when answering the Appeal Referee's questions about explaining the reason for his absence as shown by the following dialogue:

Referee: What was your intention as far as calling in that day or having your wife call in that day, Mr. Trotta?

Neil Trotta: What do you mean my intention?

Referee: Well, were you accustomed to giving the employer prior notice when you were going to go hunting or take time off work?

Neil Trotta: Yeh, I didn't have--see, like, uh, you know, I took the one day off and they knew about it--Friday, the 16th. But as far as I never, you know, received any type of written regulations, employee or whatever, but if you go to the appeal again, I didn't know where it says--that he, he never called in sick, which was untrue there, because I did call in on October 19. I definitely called. Let's see. That says: " . . . in spite of company policy of which all our employees are aware that all absences must be excused ahead of time . . . " Now, when I was sick, I don't see how I could have known I was going to be sick in advance. I tell you, that sounds a little bit ridiculous. (R.0027)

Defendant submits that Plaintiff's response to the Appeal Referee's question is indicative of a guilty conscience. Plaintiff knew he had misled his employer about his absence; that he had not been forthright as was Mr. Gardner who called the employer to ask for the day off to go deer hunting

with Plaintiff. (R.0023) In this regard it is noted that Mr. Gardner recognized his obligation to request time off from the employer, even though he was a part-time employee who came in a few hours after high school twice a week. (R.0028 & 0032) Obviously Plaintiff also recognized that obligation and deliberately violated it.

It should also be noted that the Appeal Referee pointed out "several inconsistencies in information presented by the claimant" (R.0018), and the Board of Review found his statement of reason for quit or discharge (R.0039) to be misleading and his testimony that he was ill on October 27 to lack credibility (R.0007-0008).

An example of Plaintiff's inconsistency is found in his response to his employer's appeal to the Board of Review, where he states:

He contends I went deer hunting on Oct. 19, 20, 27, and the 28. Why would I have done that when I got a deer on opening day Oct. 17th and on the 19th and 20th I was sick. He also states I went hunting on Oct. 28th which would be extremely illegal for the season closed on Oct. 27th, that is the day I went with Jack Gardner who, for a reason unknown to me signed a statement saying he went hunting with me on Oct. 20. That could be easily proven by a simple attendance check on Jack Gardner who attends Cypress High School. I'm sure you will find he was in attendance on Oct. 20th and was absent on Oct. 27th. Jack is a senior at Cypress High School. (R.0011) (Emphasis added.)

In this one paragraph Plaintiff argues he would not have gone deer hunting on October 19, 20, 27 and 28 because he got his deer on opening day, October 17, and that hunting on October 28 would have been illegal because the season closed October 27. He then admits he did go deer hunting on October 27. If he got his deer on October 17, why did he feel he needed to go hunting on October 27? It is inconsistent to argue he wouldn't have gone hunting on October 20 because he got his deer on October 17 and then admit

he went hunting on October 27. This further demonstrates his disregard for his employer's interest when he chooses to go deer hunting after he got his deer rather than report to work. The Plaintiff's testimony as to the dates he actually went hunting is contradicted by the employer's testimony that a co-worker called the night before and asked for October 20 off to go deer hunting with Plaintiff. (R.0023, 0037)

In this case it is clear from the record that the employer had a small, informal business in which the rules regarding absenteeism were very liberal. The only rule was that the employee notify the employer as soon as possible that he was to be absent and give the reasons for the absence.

Plaintiff deliberately violated this rule in that he or his wife merely called in to say Plaintiff would be absent that day without stating the reason. No effort was made to talk to the employer or Plaintiff's supervisor to make sure the proper persons were aware that he would be absent. Although there may appear to be some dispute as to dates and whether Plaintiff or his wife even called in, and what they said if they did call in, a more candid employee specifically requested time off to go deer hunting with Plaintiff, while Plaintiff clearly withheld the reasons for his absence from his employer, as already noted.

POINT III

THE BOARD OF REVIEW DID NOT ERR IN CONCLUDING THAT THE PLAINTIFF WAS DISCHARGED FOR DELIBERATE, WILLFUL ACTION ADVERSE TO HIS EMPLOYER'S RIGHTFUL INTERESTS.

Plaintiff cites a number of cases throughout his Brief suggesting that the decision of the Board of Review is wrong as a matter of law. To the

extent Plaintiff has attempted to relate those cases to the facts of the instant matter, the cases are clearly distinguishable. Defendant acknowledges that a spontaneous decision not intended to injure the employer's interests is not misconduct, Eagan v. Philips, 431 N.Y.S. 2d 731, 784 D. 2d 564 (App. Div. 1980); nor is a single act of carelessness misconduct, or minor indiscretions for which the employer has no stated policy, as in Coulter v. Commonwealth Unemployment Board of Review, 332 A. 2d 876 (Pa. 1975); nor is failure to call a specific office as required by notice when calls to other areas had been accepted previously by the employer, as in Penn Photomats Incorporated v. Commonwealth Compensation Board of Review, 417 A. 2d 1311 (Pa. 1980). However, the claimant in the instant case was not disqualified for any of the foregoing reasons, as has been detailed in Point II hereof.

In the case of Continental Oil Company v. Board of Review of the Industrial Commission of Utah, Supra at 730, this Court has defined misconduct as:

. . . the intended meaning of the term "misconduct"
. . . is limited to conduct evincing such willful or wanton disregard of employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.³

See also Januzik v. Department of Employment Security and Board of Review of the Industrial Commission Utah, 569 P. 2d 1112 (Utah 1977).

The facts as found by the Board of Review clearly require the conclusion that the claimant's conduct constituted a "deliberate disregard of standards of behavior which the employer has a right to expect of his employee."

Plaintiff further contends that the employer had a burden to reprimand or warn the Plaintiff about his conduct. While warnings put an employee on notice that his job is in jeopardy, thus supporting a finding of fault on the part of an employee who continues in conduct of which he has been so warned, the essential element in misconduct as well as voluntary leaving cases is whether the claimant is at fault in his resulting unemployment. Olof Nelson Construction Company v. Industrial Commission, Supra; Mills v. Gronning, 581 P. 2d 1334 (Utah 1978). In the instant matter, the Board of Review found the Plaintiff knew that taking the day off to go deer hunting would cause his employer additional expense and that the Plaintiff further attempted to conceal from his employer the real reason for his absence. Under such circumstances a denial of benefits is proper. 76 Am. Jur. 2d, Unemployment Compensation, Section 58, Page 954. The findings in the instant matter being supported by substantial competent evidence, the majority decision of the Board of Review properly concluded that the Plaintiff recognized his actions would be adverse to the rightful interests of the employer. Under such circumstances the decision of the Board of Review denying benefits to the Plaintiff was correct as a matter of law.

CONCLUSION

The evidence in support of the decision of the Board of Review is both competent and substantial. The Board of Review is not bound by the findings of the Appeal Referee even when such findings are supported by evidence. The decision should, therefore, be affirmed.

Respectfully submitted this _____ day of June, 1982.

DAVID L. WILKINSON,
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By _____
K. Allan Zabel

CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Defendant's Brief, postage prepaid, to the following this _____ day of June, 1982:
John L. Black, Jr., Utah Legal Services, Inc., 637 East Fourth South, Salt Lake City, Utah 84102.
